BRITISH COLUMBIA SECURITIES COMMISSION
Securities Act, RSBC 1996, c. 418

Citation: Re Nelson, 2016 BCSECCOM 50 Date: 20160217

Doris Elizabeth Nelson

Panel	Suzanne K. Wiltshire	Commissioner
	Judith Downes	Commissioner
	Audrey T. Ho	Commissioner

Hearing dates	July 9, 2015
Submissions Completed	August 31, 2015
Decision date	February 17, 2016
Appearances	
Neil Cave	For the Executive Director

Decision

I. Introduction

[1] This is a hearing under sections 161(1) and 162 of the *Securities Act*, RSBC 1996, c. 418.

[2] From 1997 through March 2009, the respondent Doris Nelson operated a payday loan business through a number of companies she promoted collectively as The Little Loan Shoppe.

[3] The respondent financed the growth of her business by raising funds from investors in British Columbia, other Canadian provinces and the United States in return for promissory notes issued by one or other of her companies.

[4] The executive director essentially alleges that the respondent ran a Ponzi scheme. In particular, the allegations are that the respondent:

a) perpetrated fraud on investors between 1998 and 2009, contrary to section 57(b) of the Act;

b) illegally distributed securities by causing the companies she controlled to issue promissory notes, contrary to section 61(1) of the Act; and

c) made false statements to the Commission, contrary to section 168.1(1)(a).

[5] The respondent was given notice of the hearing but did not appear personally nor was she represented at the hearing. She tendered no evidence and made no submissions. Accordingly, the panel heard evidence and submissions on both liability and sanctions at the same time.

[6] The executive director called one witness, a Commission investigator, and tendered numerous documents, including various documents pertaining to United States court proceedings involving the respondent.

[7] Post-hearing, the executive director tendered an affidavit of a Commission investigator made on August 6, 2015, and requested that it be entered as evidence. The affidavit attached certificates under section 168 of the Act for a number of companies certifying as to each such company that it had not filed a preliminary prospectus or prospectus, offering memorandum or report of exempt distribution with the Commission. This is additional evidence. The affidavit also attached a February 19, 2015 Order Re: Restitution and Granting Motion to Seal, issued by the United States District Court for the Eastern District of Washington (Restitution Order) and three spreadsheets prepared by Commission investigators referencing information from exhibits previously entered in the course of the hearing.

[8] The panel requested that the respondent provide her position on the executive director's request that the affidavit be entered as an exhibit post-hearing. The respondent did not reply.

[9] The panel determined to accept the affidavit and directs it be entered as the next exhibit in these proceedings.

II. Background

[10] The respondent began her payday loan business in 1997 at a single store front location in Abbotsford, British Columbia, growing quickly to add more stores and to take loan applications by telephone and fax. She moved to Spokane, Washington in about 2001 as she expanded the business operations into the United States. By 2006 she had discontinued any store front operations and the business had become an online payday/short-term loan operation.

[11] The respondent raised funds and operated the loan business through a number of British Columbian and American companies.

[12] A number of the companies issued promissory notes to investors for the funds invested. The promissory notes provided for an annual rate of return ranging generally from 40 to 60 percent per annum. The companies that issued promissory notes included: 639504 B.C. Ltd ., Little Loan Shoppe Ltd., 0738106 B.C. Ltd., 0738116 B.C. Ltd., 0738126 B.C. Ltd., Little Loan Shoppe America LLC, Little Loan Shoppe Canada LLC, LLS Canada LLC, and LLS America LLC. The respondent was a director or managing

member of all the companies listed. With the exception of 639504 B.C. Ltd., Little Loan Shoppe Ltd., and Little Loan Shoppe Canada LLC for which we have no section 168 certificates, none of the listed companies filed a prospectus, offering memorandum or report of exempt distribution with the Commission.

[13] The respondent began raising money from investors at least as early as 1998 and continued to do so through 2008. In early 2009, one of the companies, LLS America, LLC, filed for protection under Chapter 11 of the United States Bankruptcy Code.

Bankruptcy Court Examiner's Report

[14] Charles B. Hall was appointed by the U.S. Bankruptcy Court for the Eastern District of Washington as Bankruptcy Court Examiner in March 2010 to investigate the current financial condition of LLS America LLC, transactions between LLS America, its insiders and affiliates, improper transactions or misappropriation of funds, the economic viability of LLS America and its future profitability and all transactions between LLS America, its affiliates and predecessors.

[15] The Final Report of Charles B. Hall Bankruptcy Court Examiner dated November 15, 2011 (Hall Report) concluded that[1]:

- At least 650 Canadians and Americans invested approximately $135 million in the respondent's payday loan business between 1997 and 2009.
- A total of approximately $118 million was paid out to investors as return of principal ($72.7 million) and interest ($45.3 million).
- The $118 million paid out to investors all came from funds loaned by investors to the debtor and its affiliate and predecessor companies.
- These companies operated at a loss from at least as early as 2001 and were in continuous need of new investor funds to pay pre-existing obligations to investors.
- None of the business entities controlled by the respondent had any reasonable likelihood of generating revenues sufficient to ever repay their obligations to the investors.
- Distributions to the respondent recorded as equity withdrawals totaled approximately $4.3 million.

[16] The Hall Report noted that the respondent tracked cash on a global basis and directed funds into one company or another. Cash was then transferred to different entities as the need arose. Funds were transferred back and forth between the companies, sometimes on a daily basis. When the companies lacked the cash to make the scheduled interest payments to investors, a number of methods were used to excuse the delay in payment.

[1] Aggregate numbers in this paragraph are taken from the Hall Report and are totals of US and Canadian dollars without currency conversion.

[17] The Hall Report observed that:

- Investors were enticed to believe the companies could pay 40 percent interest on investor funds because they were told the companies were in fact achieving the very high interest rate charged to loan customers and were, therefore, very profitable.
- There was no evidence that management ever tried to rid investors of this false assumption.

[18] In communications with investors, the respondent referred to the business in 2006 as having "unprecedented growth" and in 2008 as experiencing "substantial growth during an otherwise declining economy", defying "financial gravity" and forecasting "an explosion of profit". The respondent also told investors that despite a slowing American economy and the possibility of a recession, the business had seen an increase in highly qualified consumers as well as higher payday loan credit scores. She indicated that new strategies would bring in more leads and that the number of loans would increase changing the business from a "medium-sized loan company to one of the largest loan companies".

[19] In reality, the Hall Report found the business was unprofitable due to the high default rate on customer loans. The business was not able to pay the high returns (generally 40 to 60 percent) set out in the promissory notes. Instead, money raised from new investors was used to pay returns to existing investors and the business was a Ponzi scheme

[20] The Hall Report concluded: "The bottom line fact is that the Debtor Companies never realized the extremely high profits on customer loans that [investors] were told were being earned. None of these Companies ever made a profit in the years they operated."

Other Proceedings

[21] Following the commencement of the Chapter 11 proceedings, the Washington State Department of Financial Institutions and the U.S. Securities and Exchange Commission each commenced civil proceedings against the respondent.

[22] The U.S. Federal Bureau of Investigation subsequently arrested the respondent on federal criminal charges and she was indicted on 110 counts involving charges of wire fraud, mail fraud and international money laundering (Indictment).

[23] On April 3, 2014, the respondent entered a guilty plea to all counts in the Indictment. In the Order Accepting Guilty Plea, the court found that the respondent's plea was knowing, intelligent and voluntary and further found that the facts admitted to by the respondent in open court constituted the essential elements of the crimes as charged.

[24] In pleading guilty to the Indictment, the respondent admitted the following facts relevant to our decision[2]:

[2] References to dollar amounts in relation to the Indictment are in US dollars.

a) The respondent utilized her payday/short-term loan business operations in a Ponzi scheme (a fraudulent investment operation that pays returns to investors from their own money or money paid by other investors, rather than from any profit earned). The Ponzi scheme took in at least $126 million from at least 800 investors worldwide, including British Columbia investors, and resulted in losses to investors of over $40 million. Investors were told the funds invested would be used to fund additional payday/short term loans and to expand the business operations.

b) The respondent utilized numerous different business entities in relation to her payday/short-term loan business and to issue promissory notes to investors.

c) The respondent devised and intended to devise a scheme to defraud and to obtain money by means of materially false and fraudulent pretenses, representations and promises. She solicited investors by promising high yields on investor funds which she claimed would be paid from the profits of the payday/short-term lending business operations. She promised investors that the profits from the business activities were such that the business could consistently and routinely pay investors 40 to 60 percent interest per annum on the their investments, when she knew that the business operations were not generating profits sufficient to pay the interest as promised. She did not disclose to investors that the lending business operations were not profitable to the extent of the promised returns. She did not disclose that investors would receive payments on their investments from the money deposited by other investors.

d) The respondent made materially false statements and representations to investors, including that: the lending business was growing and financially sound; the investments were more secure than a bank, safe and risk-free; investors could retrieve their investments within a short period if needed; the invested funds were completely collateralized by payday/short-term loans to customers; and her payday lending business was recession-proof.

e) The respondent paid commissions of at least $2 million to four investors who successfully solicited funds from additional investors.

f) The vast majority of the funds invested were used to make "lulling" payments to earlier investors and to enrich the respondent.

g) More than $4 million was transferred to the respondent personally. In addition, she and her family members charged at least $374,000 to company credit cards for personal expenditures. She used investor funds to promote her extravagant lifestyle by purchasing luxury items for herself and her family members. These included luxury automobiles and a motor home totaling approximately $300,000. She spent over $400,000 of investor funds on apparel. She used investor funds to gamble at various casinos, losing more than $400,000. She used investor funds to take extravagant vacations spending more than $100,000 on one cruise, including payments for gambling losses and art purchases while on the cruise.

h) About October 2008, as investor funds became depleted, the payments promised to investors stopped. Initially the respondent offered some investors a reduced interest rate payment of 10 percent, but over time failed to make even those payments and all payments ceased about March 2009.

i) Some investors took out loans for money to invest, using their homes and personal assets as collateral and consequently lost not only their investments but also their homes, life savings and retirement savings.

III. Liability Findings

A. Standard of Proof

[25] The standard of proof is proof on a balance of probabilities. In *F.H. v. McDougall*, 2008 SCC 53, the Supreme Court of Canada held at paragraph 49:

> In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

[26] The Court also held (at paragraph 46) that the evidence must be "sufficiently clear, convincing and cogent" to satisfy the balance of probabilities test.

B. Fraud

Applicable Law

[27] Section 57(b) of the Act says:

> A person must not, directly or indirectly, engage in or participate in conduct relating to securities or exchange contracts if the person knows, or reasonably should know, that the conduct
>
> (b) perpetrates a fraud on any person.

[28] Section 1(1) defines "security" to include a note or other evidence of indebtedness. The Commission has consistently held promissory notes to be securities: *Minnie (Re)*, 2004 BCSECCOM 677, paragraph 38.

[29] In *Anderson v. British Columbia (Securities Commission)*, 2004 BCCA 7, the British Columbia Court of Appeal cited the following elements of fraud from *R. v. Theroux*, [1993] 2 SCR 5 (at p. 20):

> … the actus reus of the offence of fraud will be established by proof of:
>
> 1. the prohibited act, be it an act of deceit, a falsehood or some other fraudulent means; and

2. deprivation caused by the prohibited act, which may consist in actual loss or the placing of the victim's pecuniary interests at risk.

Correspondingly, the mens rea of fraud is established by proof of:

1. subjective knowledge of the prohibited act; and

2. subjective knowledge that the prohibited act could have as a consequence the deprivation of another (which deprivation may consist in knowledge that the victim's pecuniary interests are put at risk).

Promissory notes are securities

[30] The respondent solicited funds from British Columbia investors in return for promissory notes to be issued by one or more of the companies involved in her payday/short-term loan business. Then, as director or managing member, she signed the notes the companies issued.

[31] The promissory notes are evidence of indebtedness and are therefore securities under the Act.

Prohibited acts

[32] The prohibited acts of deceit and falsehood are established by the admissions of the respondent in pleading guilty to the Indictment, that:

- using her payday loan/short-term lending business operations which she conducted through a number of entities, the respondent devised and conducted a Ponzi scheme that took in at least USD$126 million from at least 800 investors worldwide, including British Columbia investors;
- with intent to defraud, she promised investors that the profits from the business activities were such that the business could consistently and routinely pay investors 40 to 60 percent per annum on their investment when she knew full well that the business activities were not generating profits sufficient to pay the interest as promised;
- she misrepresented to investors that the investment was risk-free;
- instead of using investor money to fund payday loan/short-term loans and expand the business operations as promised, she used the vast majority of the funds to make lulling payments to earlier investors and to enrich herself; and
- more than USD$4 million of investor funds were transferred to the respondent personally and over USD$1.5 million was used to pay personal expenditures of the respondent and her family.

Deprivation

[33] As a result of the prohibited acts, investors suffered deprivation.

[34] The Hall Report and the Indictment vary as to the minimum aggregate number of investors (ranging from at least 650 to 800 investors) and total amount raised from all investors (ranging from at least $126 million to $135 million).

[35] In its February 19, 2015 Restitution Order flowing from the conviction of the respondent under all counts on the criminal Indictment the court found investor losses to be USD$44,781,282.24.

[36] With respect to losses suffered by British Columbia investors, the executive director referred to information gathered by the Washington State Department of Financial Institutions (DFI) consisting of completed investor questionnaires and supporting documentation, including records of financial transactions and promissory notes, and the DFI's chart summarizing that information (DFI evidence).

[37] One hundred and twenty one British Columbia residents responded to the DFI. Approximately 100 of those investors claimed to have lost their entire investment, others claimed a lesser amount outstanding than the amount originally loaned to the business. The total amount invested by these 121 British Columbia investors is at least $19 million and more than $18.5 million remains outstanding. These investors also claimed sizeable amounts of unpaid interest.

[38] There is little likelihood any of the British Columbia investors will recover the full amount of their outstanding claims given the findings in the Hall Report that the business operations were not profitable and the finding of the court in the restitution proceedings that aggregate investor losses total almost USD$45 million.

Subjective knowledge

[39] In pleading guilty to the Indictment, the respondent admitted she acted with intent to defraud investors by promising them the business was profitable when it was not and by admitting the business operations were utilized in a Ponzi scheme. She also admitted to misrepresenting the business as risk-free and to utilizing the vast majority of the investor funds to make lulling payments to earlier investors and more than USD$5.5 million of investor funds for personal enrichment, and not for the business purposes for which they were intended.

[40] As the founder of the payday/short-term loan business and director or managing member of the companies involved in that business, she had subjective knowledge of the prohibited acts and that those acts could have, as a consequence, the deprivation of the investors.

Extent of the fraud in relation to BC investors

[41] The executive director's submissions focus on British Columbia investors only. The executive director submits that 240 British Columbia investors invested $69 million based on claims filed by British Columbia residents in the Chapter 11 proceedings regarding LLS America, LLC. However, this evidence only shows each bankruptcy claimant's name and address and total amount claimed. It is not possible to determine from this evidence if a claimant is an investor or the nature of the amount claimed. As such, the evidence as to claims filed in the Chapter 11 proceedings is not proof of the number of British Columbia investors or the amounts invested by them.

[42] The best evidence we have with respect to British Columbia investors is the DFI evidence. As noted above, that evidence establishes that at least 121 British Columbia residents invested a total of at least $19 million in the respondent's payday/short term loan business in return for promissory notes and that more than $18.5 million of the amount they invested remains outstanding.

[43] There may have been more British Columbia residents who invested in the respondent's payday/short term loan business and the total amount invested by British Columbia investors may have been greater, but the evidence we have is not sufficient to be more definitive as to the extent of the fraud insofar as British Columbia investors are concerned.

Limitation Period

[44] Section 159 of the Act says "Proceedings under this Act… must not be commenced more than six years after the date of the events that give rise to the proceedings."

[45] The proceedings in this hearing were commenced by the Notice of Hearing issued on January 21, 2013. This raises an issue with respect to investments made on or before January 20, 2007 (the limitation date) by the 121 British Columbia investors proven to have invested in the respondent's payday/short-term loan business.

[46] The Commission has previously considered the application of section 159 in a number of cases. Three of these cases concern fraud.

[47] In *Dennis (Re),* 2005 BCSECCOM 65, the panel found that Dennis had perpetrated fraud based on his earlier criminal convictions on eight counts of fraud and theft. The fraud affected four couples. The counts involving three of the couples related to misconduct by Dennis that occurred before the limitation date in that matter. The three couples gave Dennis money both before and after the limitation date. The panel found that in each case the deceit was ongoing and was buttressed by issuing purported interest payments, tax receipts and portfolio reviews. The panel found:

> 37 Section 159 ties the limitation period to the "date of the events". The ordinary meaning of "the events" encompasses all events (or one event) constituting a course of conduct that may be one or more breaches of the legislation or conduct contrary to the public interest. …

> 38 Therefore, we find that "date of the events" in section 159 means the date of the last event and so has the same meaning as "the date of the occurrence of the last event…" [*the wording of the analogous provision of the Ontario Securities Act*].

[48] *Maudsley (Re)*, 2005 BCSECCOM 463, involved a mutual fund salesman who defrauded 23 of his clients of $1.6 million by redeeming their mutual funds, in some cases without consent, and used the money not for investment in other securities but for his own purposes. In the case of one client, the redemptions occurred over a period, with some taking place before the limitation date. Following *Dennis*, the panel found this to be part of the continuing conduct:

> 21 In this case, Maudsley's activities relating to the client's account constitute one course of conduct involving redemptions of the client's mutual funds securities, the use of the proceeds of those redemptions for Maudsley's own purposes, and Maudsley's concealing the evidence of that by making monthly payments to the client. These events form a continuous pattern of conduct that began in 1997 and continued through 2002. Under the reasoning in Dennis, we may therefore take into account all of this conduct in determining whether Maudsley contravened the legislation and whether it is in the public interest to make orders under the Act.

[49] *Barker (Re)*, 2005 BCSECCOM 146 involved, among other things, fraud and misrepresentation in the course of an illegal distribution. The respondents raised $2.3 million from 58 investors between November 1996 and August 2002. Of the $2.3 million raised, $875,000 was raised prior to the limitation date and 12 of the investors acquired shares only in the period prior to the limitation date. The panel followed the reasoning in *Dennis* and concluded that the pre-limitation conduct was part of continuing conduct ending in events within the limitation period:

> 86 In this case, the events in issue constitute one course of conduct involving distributions of Double Eagle shares, Barker's representations made in connection with those distributions, and the purposes to which Barker put the funds raised from those distributions. These events form a continuous pattern of conduct that began in 1996 and continued until August 2002. Under the reasoning in Dennis, we may therefore take into account all of this conduct in determining whether Barker and Double Eagle contravened the legislation and acted contrary to the public interest and whether it is in the public interest to make orders under the Act.

[50] The panel in *Barker* did not trace the continuing conduct on an investor-by-investor basis. Instead it considered the conduct as a whole, found that the fraud spanned the limitation date, and found that all of the conduct relating to the fraud including conduct before the limitation date could be taken into account.

[51] As in *Barker* and *Maudsley*, the events in the present case form a continuous course of conduct that began in 1998 and continued until March 2009 with the commencement of the Chapter 11 proceedings concerning LLS America LLC .

[52] In this case, the respondent ran an ongoing Ponzi scheme from 1998 through March 2009 in connection with her payday/short-term loan business.

[53] Throughout that period, the respondent solicited funds promising high rates of return and describing the business as highly profitable when she knew the business was not profitable.

[54] She used funds received from new and existing investors to pay the promised returns, encouraging existing investors to reinvest and make additional investments. Promissory notes issued over the years were consolidated into new promissory notes often on different terms.

[55] As the number of investors grew over the years, the required lulling "interest payments" also grew. As late as July 2008, the respondent contacted investors describing a "new massive new marketing campaign" that would substantially increase the volume of funded loans resulting in the need for significant funding. She solicited additional investments from existing investors, encouraging them to contact her and also refer their friends and family.

[56] "Interest payments" continued through to the fall of 2008, when the respondent advised investors that changes in the law were limiting the amount the business was allowed to charge for loans and the business was not making the profits which previously allowed it to pay generous interest rates. She advised that, as a result, equal monthly interest payments of 10 percent annually would commence with the next payment due, continuing the deceit that these would be paid from the reduced profits of the business.

[57] It is appropriate to take into account all of this conduct both before and after the limitation date in determining whether the respondent contravened section 57(b) and acted contrary to the public interest and whether it is in the public interest to make orders under the Act.

Conclusion

[58] We find the respondent perpetrated fraud on at least 121 British Columbia investors who invested at least $19 million in multiple transactions. In doing so, the respondent contravened section 57(b) of the Act multiple times.

C. Illegal Distribution

Applicable Law

[59] Section 61(1) of the Act says:

> Unless exempted under this Act, a person must not distribute a security unless
>
> (a) a preliminary prospectus and a prospectus respecting the security have been filed with the executive director, and
>
> (b) the executive director has issued receipts for the prospectus and preliminary prospectus.

[60] We have already found that the promissory notes are securities under the Act.

[61] Section 1(1) defines "trade" to include "(a) a disposition of a security for valuable consideration" and "(f) any act, advertisement, solicitation, conduct or negotiation directly or indirectly in furtherance of any of the activities specified in paragraphs (a) to (e)".

[62] Section 1(1) defines "distribution" as "a trade in a security of an issuer that has not been previously issued".

[63] *National Instrument 45-106 – Prospectus and Registration Exemptions* ("NI 45-106") sets out a series of specific prospectus exemptions, including those in relation to:

- Accredited investors - Subsection 2.3 removes the prospectus requirement where the purchaser purchases as principal and is an "accredited investor". An accredited investor is a defined term and for an individual, that individual must satisfy one of a number of income or assets tests.
- Close personal friends or close business associates - Subsection 2.5 removes the prospectus requirement if the investor is a close personal friend or close business associate of a director, executive officer or control person of the issuer.
- Investments of not less than $150,000 - Subsection 2.10 (as it was at the time) removes the prospectus requirement where the person purchases as principal and the security has an acquisition cost of not less than $150,000 paid in cash at the time of the distribution and the distribution is of a security of a single issuer.

Distribution of securities

[64] The respondent solicited investors to provide funds to the business by promising returns of 40 to 60 percent and stating the business was highly profitable and therefore able to pay such returns. The respondent also caused the various entities involved in the business to issue promissory notes in consideration of the funds provided by investors. She also signed the promissory notes as a director or managing member of the issuing entity.

[65] Sales of promissory notes to investors in return for their providing funds to the respondent's payday/short-term loan business are trades under subparagraph (a) of the definition of "trade". Because the promissory notes were previously unissued securities, trades in the promissory notes are also a distribution under the Act.

[66] The respondent's actions in soliciting loans, causing the various entities to issue promissory notes and signing the promissory notes are all acts in furtherance of trades in the promissory notes. As such, these actions of the respondent are trades under subsection (f) of the definition of "trade".

[67] The respondent therefore distributed securities, namely the promissory notes, within the meaning of the Act.

Evidentiary and other issues concerning the distributions

[68] There are numerous issues with the evidence and submissions that the executive director tendered in support of the illegal distribution allegations.

[69] The first issue relates to the section 168 certificates tendered by the executive director. The section 168 certificates establish that certain of the entities shown by the DFI evidence to have issued promissory notes to British Columbia investors never filed a prospectus under the Act. Those entities are:

- 0738106 B.C. Ltd.
- 0738116 B.C. Ltd.
- 0738126 B.C. Ltd.
- Little Loan Shoppe America LLC
- LLS Canada LLC
- LLS America LLC.

[70] However, we have no section 168 certificates or any other evidence as to whether or not a number of other entities, including 639504 B.C. Ltd., Little Loan Shoppe Ltd. and Little Loan Shoppe Canada LLC, shown by the DFI evidence to have issued promissory notes to BC residents ever filed a prospectus. The executive director has therefore failed to prove that the promissory notes issued by those other entities were issued in contravention of section 61(1).

[71] The second issue concerns the limitation period. The DFI evidence shows that many of the loans were made and promissory notes were issued in consideration of those loans more than six years prior to January 21, 2013 when the Notice of Hearing was issued. This raises limitation issues in the context of the illegal distribution of securities. The executive director did not make any submissions on how we should deal with these issues.

[72] The next issues concern consideration and issuing entity. The DFI evidence shows that many investors made separate investments over the years and that many of the notes originally issued in consideration of funds paid to the respondent's business were subsequently cancelled. New notes, sometimes consolidating a number of earlier notes, were issued in their place, most often on different terms, sometimes by a different issuer than the entity that had issued the original note(s). There was almost always a notation on the new notes to the effect that the prior notes were cancelled. In addition, a single note was sometimes issued by two or more entities. This evidence raises issues as to "disposition for valuable consideration" and whether replacement notes are distributions. These issues are not addressed in the executive director's submissions.

[73] Finally, although the onus is on a respondent to establish exemptions, the DFI evidence also raises issues as to whether or not some of the investments would have been exempt from the prospectus requirements under the Act. Some investors answered "yes" in response to the DFI's question as to whether they were "an accredited investor with a net worth of more than $1 million", but did not provide sufficient information to ascertain whether or not they would have qualified as accredited investors under NI45-106. Other investors appear to have invested $150,000 or more but it was not always clear whether or not a particular investment met the criteria for that exemption. Additionally, there is the question of whether or not the $150,000 or more exemption might apply in the case of consolidating notes. While there was evidence that some investors may have known Nelson prior to investing, it was insufficient to determine that a given investor would have qualified for exemption as a close personal friend or close business associate at any given point in time. None of these issues are addressed in the submissions.

Conclusion

[74] Given the evidentiary and other issues noted above and the lack of submissions in relation to those issues, in coming to our conclusion as to the extent of the illegal distribution of securities by the respondent, we considered only those distributions where such issues do not arise.

[75] We find that the respondent distributed securities in contravention of section 61(1) of the Act to 47 British Columbia investors who invested, in aggregate, CDN$3,074,900 plus USD$73,000. Appendix A lists these distributions by investor using as an identifier the number beside the investor's name in Exhibit D "BC Investors Who Responded to Washington State Department of Financial Institutions" appended to the August 6, 2015 Commission investigator's affidavit entered as an exhibit in these proceedings.

D. False Statements

[76] Section 168.1(1)(a) of the Act states:

> A person must not
> (a) make a statement in evidence or submit or give information under this Act to the commission, executive director or any person appointed under this Act that, in a material respect and at the time and in light of the circumstances under which it is made, is false or misleading, or omit facts from the statement

or information necessary to make that statement or information not false or misleading.

[77] The meaning of "in a material respect" was considered in *Jo Ann Nuttall*, 2011 BCSECCOM 521, where the panel held:

> 44. The materiality threshold in section 168.1(1)(a) measures the degree to which the information given is false or misleading – how far it departs from the truth – not its relevance to the investigation.
>
> 45. Accordingly, the phrase "in a material respect and at the time and in light of circumstances under which it is made" requires a comparison of the information that was given to the facts that were known to the person giving the information at the time the person gave it.

[78] In the Notice of Hearing, the executive director alleges that the respondent made false statements to the Commission contrary to section 168.1(1)(a) in her affidavit of March 26, 2009 that was provided in response to a Commission production order.

[79] After receiving the affidavit, the Commission investigator sent the respondent a closing letter indicating she was concluding her review, without taking any kind of enforcement action, based on the representations that the respondent had made to her.

[80] The executive director alleges, in particular, that the false statements consist of the list of the investors (30 in total) in 0738126 B. C. Ltd. included in her affidavit and the respondent's explanation of her relationship with each of them as it existed at the time of their investment in 0738126 B.C. Ltd.

[81] These statements conflict with findings in the Hall Report and information provided by the investors themselves to the DFI and contained in the DFI evidence that show the following. By the time the respondent swore her affidavit in late March 2009, there were many more than 30 investors in 0738126 B.C. Ltd. The Hall Report found there were 184 investors in 0738126 B.C. Ltd. and the DFI evidence establishes that of the 121 British Columbia investors who responded to the DFI, over 50 of them were investors in 0738126 B.C. Ltd. As well, for the several investors both listed by the respondent and included as an investor in the DFI information, the respondent's description of them as being close friends and/or close business associates is at odds with the investors' own descriptions of being referred to the investment by a friend or relative. None described themselves as close personal friends or close business associates of the respondent.

[82] As the sole director and officer of 0738126 B.C. Ltd. and as the authorized officer who signed all promissory notes distributed by these companies, the respondent knew the number of investors in 0738126 Ltd. exceeded the 30 she listed in her affidavit. She also knew that her description of her relationship with a number of the investors was false.

[83] We find the information so provided by the respondent in her affidavit to be false and misleading in a material respect and at the time and in light of the circumstances under which it was made. In making these false statements in her affidavit, the respondent contravened section 168.1(1)(a).

[84] The executive director also submitted that the respondent made false statements in her affidavit in relation to LLS America LLC, but no such allegation was made in the Notice of Hearing. Accordingly, we have not addressed that submission.

E. Section 168.2

[85] Section 168.2 (1) of the Act says:

> (1) If a person, other than an individual, contravenes a provision of this Act or of the regulations, or fails to comply with a decision, an employee, officer, director or agent of the person who authorizes, permits or acquiesces in the contravention or non-compliance also contravenes the provision or fails to comply with the decision, as the case may be.

[86] The only respondent named in this matter is an individual. None of the entities involved in the respondent's business operations are named as respondents in the Notice of Hearing.

[87] In the Notice of Hearing, the executive director alleges that by making false statements to the Commission, the respondent also contravened section 168.2. But section 168.2 is engaged only when there is a contravention by a person other than an individual. Since there are no allegations and no findings of any contraventions by a person who is not an individual, section 168.2 cannot apply.

[88] In his written submissions, the executive director alleges that by authorizing the illegal distributions of promissory notes in her role as director or manager of the issuer companies, the respondent also breached section 61 by operation of section 168.2. However, there is no allegation of a section 61 breach by way of section 168.2 in the Notice of Hearing. In the absence of a specific allegation in the Notice of Hearing, such a finding cannot be made. Even if such an allegation had been made in the Notice of Hearing, section 168.2 cannot apply for the reasons set out in paragraph 87.

[89] Section 168.2 therefore has no application to this matter.

F. Summary of Findings on Liability

[90] We find the respondent:

1. in contravention of section 57(b), perpetrated fraud on at least 121 British Columbia investors who invested at least $19 million in multiple transactions;

2. in contravention of section 61(1), distributed securities to 47 investors who invested, in aggregate, CDN$3,074,900.00 plus USD$73,000; and

3. in contravention of section 168.1(1)(a), made false statements to the Commission in her affidavit sworn on March 26, 2009, when she misrepresented the number of investors in 0738126 B.C. Ltd. and her relationship with several of them.

IV. Sanctions

A. Position of the Executive Director

[91] The executive director seeks orders:

a) under section 161(1)(b)(ii), permanently prohibiting the respondent from trading or purchasing securities or exchange contracts;

b) under section 161(1)(c), that any or all of the exemptions set out in the Act and regulations do not apply to the respondent; and

c) under section 161(1)(d), permanently prohibiting the respondent from being or acting as a director or officer of any issuer, becoming or acting as a registrant or promoter, acting in a management or consultative capacity in connection with activities in the securities market, and engaging in investor relations activities.

[92] Under section 161(1)(g), the executive director seeks an order that the respondent pay to the Commission the amount of $69 million.

[93] Under section 162, the executive director seeks an administrative penalty against the respondent in the amount of $28 million.

B. Factors

[94] In *Re Eron Mortgage Corporation*, [2000] 7 BCSC Weekly Summary 22, the Commission identified certain factors relevant to sanction as follows (at page 24):

> In making orders under sections 161 and 162 of the Act, the Commission must consider what is in the public interest in the context of its mandate to regulate trading in securities. The circumstances of each case are different, so it is not possible to produce an exhaustive list of all of the factors that the Commission considers in making orders under sections 161 and 162, but the following are usually relevant:
>
> - the seriousness of respondent's conduct,
> - the harm suffered by investors as a result of the respondent's conduct,
> - the damage done to the integrity of the capital markets in British Columbia by the respondent's conduct,
> - the extent to which the respondent was enriched,
> - factors that mitigate the respondent's conduct,
> - the respondent's past conduct,
> - the risk to investors and the capital markets posed by the respondent's continued participation in the capital markets of British Columbia,

- the respondent's fitness to be a registrant or to bear the responsibilities associated with being a director, officer or adviser to issuers,
- the need to demonstrate the consequences of inappropriate conduct to those who enjoy the benefits of access to the capital markets,
- the need to deter those who participate in the capital markets from engaging in inappropriate conduct, and
- orders made by the Commission in similar circumstances in the past.

C. Application of the factors

Seriousness of the conduct, damage to the integrity of the capital markets and harm to investors

[95] The respondent carried out a multi-million dollar fraud that was international in scope. Her payday/short-term loan business was the front for a widespread Ponzi scheme that resulted in at least 121 British Columbia investors making investments in the business of at least $19 million, of which approximately $18.5 million remains outstanding.

[96] Fraud is the one of the most serious types of misconduct under the Act.

[97] As stated in *Manna Trading Corp. Ltd.*, 2009 BCSECCOM 595 at paragraph 18, "Nothing strikes more viciously at the integrity of our capital markets than fraud".

[98] A contravention of section 61(1) of the Act is also inherently serious. That section is part of the foundation requirements for protecting investors and the integrity of the capital markets. It ensures that investors get the information necessary for an informed investment decision.

[99] The respondent's misconduct was an abuse of British Columbia's capital markets.

[100] The respondent's conduct seriously harmed investors. Most of the 121 known British Columbia investors claim to have lost their entire investment and there is little likelihood of any significant recovery.

[101] Making false statements to the Commission is also serious as it undermines the Commission's investigation and creates a risk that a respondent will escape enforcement of the Act.

[102] Here, the respondent's false statements had an immediate and direct impact, causing the Commission to pause the investigation for a period.

Enrichment

[103] The respondent was enriched from investor funds.

[104] In pleading guilty to the Indictment, the respondent admitted that more than USD$4 million was transferred to her personally.

[105] The respondent also admitted that she and family members charged personal expenditures to company credit cards and used investor funds to make personal purchases totalling more than USD$1.5 million.

Mitigating and aggravating factors

[106] There are no mitigating factors.

[107] The executive director lists as aggravating factors the respondent's actions to impede the Commission's investigation by providing commission staff with fabricated financial statements, revising promissory notes and instructing investors to make false statements to commission staff.

[108] The executive director refers us in support of this submission to several pages of the Hall Report concerning the Commission's investigation. As summarized by Hall, the actions the executive director lists as aggravating followed soon after the respondent was advised by the Commission that it was investigating the fund raising activities of 0738126 B.C. Ltd. and involved the following:

- The respondent instructed the business operations' personnel to revise the records of investors in 0738126. Some investors were "moved" to new companies and provided with replacement notes from those companies to reduce the number of investors in 0738126. Notes held by other investors, including notes issued to them by another of the respondent's companies, were combined into single new notes issued by 0738126 for $150,000 or more.
- The respondent sent emails to the 30 "remaining" investors in 0738126 Ltd. instructing them to say, among other things, that all their money had been loaned to 0738126 and that they had been friends or business associates of the respondent for a specified number of years and also telling them not to inform the Commission about any other investors.
- The respondent had financial statements for 0738126 sent to the Commission prior to her meeting with the Commission in October 2008 that reported revenue from loan fees of $3.3 million and interest paid to investors of $2.3 million as well as payment of other costs and expenses, even though 0738126 was subsequently found in the Hall Report to be a shell company with no revenue or expenses. The Hall Report describes the statements as a complete fabrication.

[109] We agree with the executive director's submission that the respondent's actions were directed to impeding the Commission's investigation into the respondent's fund raising activities. They were designed and carried out to support the respondent's false statements to the commission concerning the availability of prospectus requirement exemptions as well as to demonstrate the financial viability of 0738126, even though in reality it was nothing but a shell company. As such, the respondent's actions are aggravating factors.

Past conduct

[110] The respondent has no history of past regulatory misconduct.

Risk to investors and capital markets, fitness to be a registrant or a director, officer or adviser to issuers

[111] The respondent's contraventions of the Act demonstrate that her continued participation in the capital markets of British Columbia poses a significant risk to investors and capital markets and that she is unfit to participate in British Columbia's capital markets in any capacity.

Specific and general deterrence

[112] The sanctions we impose must be sufficient to ensure that the respondent and others will be deterred from engaging in similar misconduct in the future

Previous orders

[113] The executive director cites *IAC – Independent Academies Canada Inc.*, 2014 BCSECCOM 260, at paragraphs 27 to 35 to the effect that in previous cases involving fraud the Commission has imposed permanent bans and significant administrative penalties.

[114] The executive director submits that where it has found fraud, the Commission has ordered disgorgement of the amount raised fraudulently from investors and an administrative penalty double that amount, citing: *Manna* at para 53, *Sung Wan (Sean) Kim,* 2010 BCSECCOM 684 at paragraph 46 and *IAC* at paragraph 40.

[115] The executive director submits that *Manna* and *Kim* involved deliberate, large-scale frauds, similar in their circumstances to the fraud conducted by the respondent in this case.

[116] In *Kim*, the respondent raised $15.7 million from investors in a "calculated fraud stretching over two and a half years". The Commission ordered Kim to disgorge the $15.7 million raised from investors and to pay a $31.4 million administrative penalty. The Commission also banned Kim permanently from the capital markets.

[117] In *Manna*, the respondents raised close to $13 million from investors in a "deliberate and well-organized fraud". The Commission ordered the respondents to disgorge the amount raised from investors and to pay an administrative penalty equal to double that amount. The Commission also banned the respondents permanently from the capital markets.

[118] We have noted the inherent seriousness of a contravention of section 61(1) of the Act. We have also noted the seriousness of making false statements to Commission staff in the course of an investigation and the direct impact of the respondent's false statements in the present case. However, the executive director makes no submissions respecting previous orders made in respect of similar contraventions of sections 61(1) and 168.1(1)(a). Accordingly, we have considered the respondent's contraventions of these sections of the Act in conjunction with the fraud finding in making our orders and not separately.

Market Prohibitions

[119] We find no reason to depart from the practice of imposing permanent prohibitions on those who commit fraud.

[120] The respondent represents a significant future risk to capital markets. We have accordingly imposed permanent restrictions under sections 161(1)(b)(ii), (c) and (d).

Section 161(1)(g) order

[121] Under section 161(1)(g), a respondent may be ordered to pay to the Commission any amount obtained or payment or loss avoided, directly or indirectly, as a result of the respondent's contraventions of the Act.

[122] The executive director submits that the respondent's misconduct warrants an order in the amount of $69 million as being the amount raised from British Columbia investors based on the bankruptcy claims information. We have already rejected that evidence as insufficient to establish the amount raised from British Columbia investors.

[123] On the basis of the DFI evidence, we have determined the respondent obtained at least $19 million from British Columbia investors through the various entities she used to conduct her payday/short-term loan business and carry out her Ponzi scheme.

[124] In considering orders under section 161(1)(g), we begin with the general principle that the full amount obtained in contravention of the Act may be ordered to be paid to the Commission under section 161(1)(g).

[125] We have concluded a portion of the at least $19 million proven to have been obtained was repaid, leaving $18.5 million outstanding.

[126] The respondent's misconduct was most serious. In the circumstances, a section 161(1)(g) order in the amount of $18.5 million is appropriate to provide specific and general deterrence.

[127] Given the February 19, 2015 Restitution Order flowing from the criminal Indictment in the United States, it would not be fair for the respondent to have to pay substantially the same amount twice for the same misconduct. Therefore, we are ordering that any amounts paid under the Restitution Order to the 121 British Columbia investors identified in the DFI evidence be credited against the section 161(1)(g) order.

Administrative Penalty

[128] In the circumstances of this case, it is appropriate to impose a substantial administrative penalty to deter the respondent and like-minded individuals from engaging in similar misconduct.

[129] The executive director submits that the misconduct warrants an administrative penalty equal to the amount raised from British Columbia investors (which he says is $69 million) but adds that the respondent has already been sanctioned by a U.S. federal court and ordered to pay restitution of $45 million. We are not clear how the executive director then arrives at the $28 million administrative penalty he seeks.

[130] What is clear is that the executive director is suggesting an administrative penalty starting point as being an amount equal to the amount raised from British Columbia investors rather than an amount double that amount as in the cases he cited.

[131] Fundamentally, sanctions must be applied in a manner proportionate to the misconduct. In these circumstances, we find that an administrative penalty of $18.5 million (which equates to the proven amount raised from British Columbia investors less the portion of that amount repaid) is appropriate given the seriousness of the respondent's conduct. This amount is also sufficient to deter other market participants from engaging in similar misconduct.

[132] We see no reason to further reduce the amount of the administrative penalty in view of the Restitution Order of the U.S. federal court as we have already more appropriately addressed that order in conjunction with the section 161(1)(g) order.

V. Orders

[133] Considering it to be in the public interest, and pursuant to sections 161 and 162 of the Act, we order:

1. under section 161(1)(b)(ii), that the respondent is permanently prohibited from trading or purchasing securities or exchange contracts;

2. under section 161(1)(c), that any or all of the exemptions set out in the Act, regulations or a decision do not apply to the respondent;

3. under section 161(1)(d)(i) and (ii), that the respondent resign any position she holds as, and is permanently prohibited from becoming or acting as, a director or officer of any issuer or registrant;

4. under section 161(1)(d)(iii), the respondent is permanently prohibited from becoming or acting as a registrant or promoter;

5. under section 161(1)(d)(iv), that the respondent is permanently prohibited from acting in a management or consultative capacity in connection with activities in the securities market;

6. under section 161(1)(d)(v), that the respondent is permanently prohibited from engaging in investor relations activities;

7. under section 161(1)(g), that the respondent pay to the Commission any amount obtained, or payment or loss avoided, directly or indirectly as a result of her contravention of section 57(a) of the Act, which amount we find to be $18.5 million;

8. that any amounts paid under the February 19, 2015 Restitution Order of the U.S. federal court to the 121 British Columbia investors identified in the DFI evidence be credited against the section 161(1)(g) order; and

9. under section 162, that the respondent pay to the Commission an administrative penalty of $18.5 million.

February 17, 2016

For the Commission

Suzanne K. Wiltshire
Commissioner

Judith Downes
Commissioner

Audrey T. Ho
Commissioner

Appendix A

Investor Number	Date of Distribution	Amount of Distribution CDN Dollars	Amount of Distribution USD Dollars
5	December 2007	50,000	
9	June 2008	80,000	
10	January 2008	35,000	
10	May 2008	15,000	
22	March 2008	30,000	
28	April 2008	30,000	
32	December 2007	60,000	
34	April 2008	40,000	
34	July 2008	15,000	
37	August 2008	50,000	
37	August 2008	20,000	
40	July 2007	10,000	
40	January 2008	30,000	
41	April 2007	30,000	
41	July 2008	30,000	
42	December 2007	30,000	
43	April 2008	50,000	
43	May 2008	50,000	
43	July 2008	50,000	
49	September 2008	50,000	
51	October 2007	30,000	
52	June 2008	25,000	
53	December 2007	30,000	
56	December 2007	50,000	
63	March 2007	20,000	
64	October 2007	30,000	

Investor Number	Date of Distribution	Amount of Distribution CDN Dollars	Amount of Distribution USD Dollars
66	May 2008	100,000	
67	June 2008	100,000	
69	January 2008		13,000
69	January 2008	15,000	
69	December 2007	30,500	
69	April 2008	20,000	
73	April 2008	30,000	
74	December 2007	90,000	
75	February 2008	10,000	
76	August 2008	75,000	
79	June 2008	100,000	
80	January 2008	100,000	
81	June 2007	50,000	
84	May 2008	60,000	
86	June 2008	5,000	
87	March 2008	25,000	
89	April 2008	20,000	
90	September 2007	100,000	
93	August 2007	80,000	
93	June 2008	40,000	
94	November 2007	40,000	
94	May 2008	40,000	
96	July 2008	30,000	
98	March 2008	210,000	
99	May 2008	100,000	
99	June 2008	84,400	
102	September 2008	100,000	
105	March 2008	25,000	
106	May 2007	70,000	

Investor Number	Date of Distribution	Amount of Distribution CDN Dollars	Amount of Distribution USD Dollars
111	October 2007	30,000	
111	September 2008	30,000	
112	May 2008	50,000	
114	December 2007		60,000
114	March 2008	80,000	
118	November 2007	80,000	
118	December 2007	50,000	
118	July 2008	100,000	
119	July 2007	60,000	
119	September 2007	40,000	
120	June 2008	75,000	
	Totals:	**CDN$3,074,900**	**USD$73,000**